

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

In re: INACOM CORP., et al., Debtors.

Bankruptcy Case No. 00-2426 (PJW)

INACOM CORP., on behalf of all affiliated  
Debtors,

Civil Action No. 04-148 (GMS)

Plaintiff,

[Adversary Proc. No. 02-3496 (PJW)]

v.

TECH DATA CORPORATION,

Defendant.

**[PROPOSED] FINAL PRE-TRIAL ORDER**

This matter having come on before the court at a pretrial conference held pursuant to Fed.R.Civ.P ("Rule") 16, and Andrew W. Caine of Pachulski, Stang, Ziehl, Young, Jones & Weintraub, 919 Market Street, 17<sup>th</sup> Floor, Wilmington, Delaware, (302) 652-4100, having appeared as counsel for plaintiff Inacom Corporation, as represented by the duly authorized Plan Administrator ("Plaintiff", "Inacom" or "Debtor"), Charles Tatelbaum and Stephen C. Hunt, of Adorno & Yoss, L.L.P., 350 East Las Olas Blvd., Suite 1700, Ft. Lauderdale, FL 33301, (954) 763-1200 having appeared as counsel for defendant Tech Data Corporation ("Defendant" or "Tech Data") and James F. Harker, of Herlihy, Harker & Kavanagh, 1300 North Market Street, Suite 400, Wilmington, Delaware 19899, (302) 654-3111, Local Counsel for Tech Data ("Defendant" or "Tech Data") (collectively, Plaintiff and Defendant are referred to herein as the "Parties"), the following actions were taken:

**I     STATEMENT OF THE NATURE OF THE ACTION AND BASIS FOR FEDERAL JURISDICTION.**

1.       This is an action for avoidance and recovery of alleged preferential transfers under 11 U.S.C. §§ 547 and 550, and the Court has jurisdiction over the parties and claims set forth in this matter pursuant to 28 U.S.C. § 1334(b). Venue is proper pursuant to 28 U.S.C. § 1409. This action is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Jurisdiction and venue are not disputed.

2.       This is an adversary proceeding initiated under 11 U.S.C. § 547 against the Defendant for receipt of preferential transfers. The reference of this matter was withdrawn to this Court from the United States Bankruptcy Court for the District of Delaware in September 2004.

**II     PROCEDURAL POSTURE**

3.       Plaintiff InaCom Corp. and its related debtors each filed a voluntary petition for relief under chapter 11 of title 11, United States Code (the "Bankruptcy Code") on June 16, 2000 (the "Petition Date").

4.       Plaintiff filed a Complaint for Avoidance and Recovery of Preferential Transfers (the "Complaint") on May 20, 2002 against Defendant. Plaintiff filed a First Amended Complaint for Avoidance and Recovery of Preferential Transfers (the "Complaint") on June 5, 2002 against Defendant. Defendant filed its Answer And Affirmative Defenses on April 9, 2004. No counter-claims have been asserted though Defendant did file a proof of claim in the Debtor's bankruptcy estate.

### **III STIPULATIONS AND STATEMENTS OF FACT.**

5. The following stipulations and statements were submitted and are attached to and made a part of this order:

#### **A. Uncontested Facts**

##### **General Background**

6. In or about November, 1999, Inacom was in the business of providing of information technology products and technology management services to primarily Fortune 1000 clients. Inacom distributed its products and services through a marketing network of approximately ninety (90) business centers throughout the United States. Inacom was in two basic lines of business; computer hardware and peripherals distribution (the "Distribution Business") and a related technology service and configuration business (the "Service Business"). Through these businesses, Inacom delivered personal computer and related information technology products to businesses together with related support services.

7. Tech Data is a corporation formed under the laws of the State of Florida, with its principal place of business located at 5350 Tech Data Drive, Clearwater, Florida. Tech Data sells computer products and peripherals, as well as a variety of other electronic products.

8. For a period of some years prior to the Petition Date, Inacom purchased product from Tech Data whereby Tech Data would ship product to Inacom on credit.

9. In early December, 1999, Inacom reached an agreement in principle for sale of the assets of the Distribution Business to Compaq Computer Corporation ("Compaq"). On January 4, 2000, Inacom signed an Asset Purchase Agreement (the "APA"), and certain

related operational agreements, with Compaq and its acquisition subsidiary ITY Corp., subsequently known as Custom Edge, Inc. (also referred to collectively, as "Compaq").

10. The Asset Purchase transaction closed on February 16, 2000. In general, in exchange for \$369.5 million, Compaq purchased the inventory, supply agreements, customer contracts, leases, furniture, fixtures and equipment of the Distribution Business, and assumed certain related outstanding liabilities. Compaq hired essentially all of the Debtors' employees and management personnel associated with the Distribution Business, and maintained operations from the same business premises.

11. Prior to filing bankruptcy, Inacom attempted to sell the remaining Service Business.

12. On June 16, 2000 (the "Petition Date"), Inacom and a number of related entities (the "Debtors") filed petitions under Chapter 11 of the Bankruptcy Code.

**The Parties' Relationship and the Challenged Transfers**

13. Within the 90 days prior to the Petition Date (March 17-June 16, 2000), the Debtors made payments to Tech Data in the amount of \$4,606,288.97 (the "Transfers"), which are more specifically described in Exhibit "A" attached hereto at Tab 1. .

14. The Transfers were received by, and conferred a material benefit upon Tech Data.

15. All of the Transfers were made in reference to specific invoices issued to Inacom by Tech Data for its products previously sold, delivered, and accepted by Inacom, which invoices are identified on Tab 2. Tech Data does not stipulate that Inacom was indebted to Tech Data on account of these invoices at the time that the Transfers were made.

16. All of the Transfers were payments from funds on hand in the Debtors' bank accounts.

17. Defendant was the initial transferee of the Transfers.

**B. Contested Issues of Fact and Law to be Litigated**

18. The parties' respective Proposed Findings of Fact and Conclusions of Law were filed concurrently with the submission of this Pretrial Order. To the extent not otherwise stipulated in this Pretrial Order, all proposed findings of fact and conclusions of law are contested. The ultimate issues in dispute are as follows:

- Inacom Contends:
  - a. Debtors were insolvent at all relevant times during the preference period, and Defendant cannot rebut the presumption of insolvency provided in 547(f);
  - b. All of the Transfers were made to Defendant for its benefit as a creditor of the Debtors, on account of antecedent debt owing from the Debtors to Defendant;
  - c. The Transfers enabled Defendant to receive more than it would if the case were under chapter 7, the Transfers had not been made, and Defendant received payment of the outstanding debt to the extent provided by the Bankruptcy Code;
  - d. Defendant did not give subsequent new value to the Debtors' pursuant to Bankruptcy Code Section 547(c)(4); and

- e. The relief requested in the Complaint should not be denied, in whole or in part, based upon any other defense;
  - f. Neither Defendant nor any other party was an intended third party beneficiary to the APA, which specifically provides as such;
  - g. None of the invoices paid by the Transfers were assumed in the APA, of which Defendant was clearly and expressly aware in correspondence that it authored;
  - h. There was never any writing between Inacom, Defendant and Compaq relieving Inacom of responsibility to satisfy outstanding invoices to Defendant;
  - i. With respect to additional factual and legal contentions, Plaintiff refers to its Proposed Findings of Fact and Conclusions of Law, filed concurrently herewith.
- Tech Data Contends:
    - a. The Transfers were not made to or for the benefit of a creditor, within the meaning of Section 547(b)(1) of the Bankruptcy Code;
    - b. The Transfers were not made for or on account of an antecedent debt owed by the transferor debtor before such transfers were made, within the meaning of Section 547(b)(2) of the Bankruptcy Code;

- c. The Transfers were not made while the transferor debtor was insolvent, within the meaning of Section 547(b)(3) of the Bankruptcy Code;
- d. The relief requested in the Complaint should be denied, in whole or in part, because the Transfers did not enable Tech Data to receive more than it would have received if the case were a chapter 7 case, if the Transfers had not been made, and if Tech Data received payment of such debt to the extent provided by the Bankruptcy Code;
- e. Inacom is not entitled to the recovery of any alleged Transfers pursuant to Section 550 of the Bankruptcy Code;
- f. Tech Data was a direct, intended third party beneficiary of the APA. If Tech Data was not an intended third party beneficiary of the APA, it was an implied third party beneficiary of the APA;
- g. The APA was, among other things, a contract for the sale of goods, within the meaning of Article 2 of the Uniform Commercial Code;
- h. The APA selected New York law as the applicable law for the APA;
- i. The APA satisfies the requirements of the statute of frauds under applicable law, including New York law;

- j. The APA satisfies the requirements of the parol evidence rule under applicable law, including New York law, to bar the use of external evidence in interpretation of the contract;
- k. The Francis Letter relates back to the APA and confirms that HP had assumed Inacom's account payable obligations to Tech Data, and also acts as an independent contract between HP and Tech Data;
- l. Tech Data has satisfied its burden of rebutting the presumption of insolvency, and shifted the burden of proof on insolvency to Inacom, which Inacom cannot prove;
- m. Inacom is incapable of establishing a prima facie case for Tech Data's liability under Section 547(b) of the Bankruptcy Code;
- n. Inacom is not entitled to recover damages from Tech Data pursuant to Section 547 of the Bankruptcy Code, nor is it entitled to recover damages pursuant to any other legal or equitable theory;
- o. With respect to additional factual and legal contentions, Tech Data respectfully refers the Court to its Proposed Findings of Fact and Conclusions of Law, filed concurrently herewith.

#### **IV WAIVER OF CLAIMS AND DEFENSES**

19. Inacom does not waive any claims.

20. Tech Data hereby waives the defenses previously stated as its First Affirmative Defense (contemporaneous exchange for new value), Second Affirmative Defense



(subsequent new value), Third Affirmative Defense (ordinary course of business), Fourth Affirmative Defense (no dividend to creditors), Eighth Affirmative Defense (reasonably equivalent value), and Twelfth Affirmative Defense (standing), but expressly reserves the remaining Affirmative Defenses set forth in its Answer. Tech Data conditionally waives its Sixth Affirmative Defense (limitations), but only insofar as that applies affirmative defense applies to Inacom's Complaint for damages under Section 547 of the Bankruptcy Code, and preserves the defense for all other purposes.

21. Tech Data does not waive any of its claims against third party defendant HP.

#### **V EXHIBITS**

22. Attached hereto at Tab 2 and Tab 3 are the schedules, submitted by Plaintiff and Defendant, respectively, of all exhibits (except for rebuttal exhibits), including documents, summaries, charts and other items expected to be offered in evidence and any demonstrative evidence to be offered during trial, along with corresponding statements of any objections to the authenticity thereof.

#### **VI POTENTIAL WITNESSES**

23. Attached hereto at Tab 4 and Tab 5 are lists submitted by Plaintiff and Defendant, respectively, of the names of the potential witnesses to be called by each party, with a corresponding statement of any objections to calling, or to the qualifications of, any witness identified on the other party's list.

**VII EXPERT WITNESSES**

24. As this matter is not proceeding as a jury trial, the parties have not attached agreed statements setting forth the qualifications of their expert witnesses in a form that may be read to the jury at the time that the expert witness takes the stand. Attached hereto at Tabs 6 and 7 are lists submitted by Plaintiff and Defendant, respectively, of the names of the potential expert witnesses to be called by each party, with a corresponding statement of any objections to calling, or to the qualifications of, any witness identified on the other party's list. Tech Data will be providing concurrently herewith a statement regarding its expert witnesses in a form that may be read to the jury, to which Inacom has not given its agreement.

**VIII DEPOSITIONS TO BE READ INTO EVIDENCE**

25. Attached hereto at Tab 8 and Tab 9 are lists submitted by Plaintiff and Defendant, respectively, of all depositions, or portions thereof, (except those used for impeachment or rebuttal), which the parties reserve the right to read into evidence, and corresponding statements of objection thereto.

**IX ITEMIZED STATEMENT OF SPECIAL DAMAGES**

26. Plaintiff seeks the avoidance and recovery of the payments listed on Exhibit "A" attached at Tab 1. Plaintiff seeks prejudgment interest from the date of the filing of the Complaint.

**X JURY/NON-JURY TRIAL – FINDINGS AND CONCLUSIONS**

27. This action has been and is set for a bench trial. Lexmark Data filed a Motion For The Court To Order A Trial By Jury (the "Motion"), to which Tech Data joined, and to which Plaintiff filed opposition. Lexmark's Motion is currently pending on the Court's

docket. Since the action currently sits as a non-jury trial, each party shall separately file proposed Findings of Fact and Conclusions of Law concurrently with the submission of this Pretrial Order. Defendant intends to submit currently with this Pre-trial Order its proposed trial brief, jury instructions and verdict form.

#### **XI HISTORY AND STATUS OF SETTLEMENT NEGOTIATIONS**

28. The parties have met and conferred in good faith in an attempt to settle the action prior to the submission of the Joint Pre-Trial Order. On July 12 and 13, 2005, the Parties engaged in a mediation before the Hon. Roger Whelan (U.S.B.C. – Ret.), but could not reach an agreed resolution. The possibility of settlement of this case has, and continues to be discussed between the parties.

#### **XII COMPLETION OF DISCOVERY**

29. Inacom has agreed to allow further limited depositions of Laz Krikorian (Inacom's former Controller) and Thomas Fitzpatrick (Inacom's former CFO) on September 14 and 15, 2005. Discovery has otherwise been completed, including the depositions of expert witnesses. Absent good cause shown, no further discovery shall be permitted.

#### **XIII MOTIONS IN LIMINE**

30. A list of any motions *in limine* filed by the Parties concurrent with the submission of this Pretrial Order are attached at Tab 10 and Tab 11, respectively.

#### **XIV TYPE AND LENGTH OF TRIAL**

31. Depending on the outcome of rulings on pending motions and motions *in limine*, as well as the number of witnesses called to testify, the trial could take 2-5 days.

32. Also pending before this Court are three related, additional preference actions brought by, or on behalf of, Inacom: Civil Case No. 04-CV-593 (GMS), against Ingram Entertainment, Inc. ("Ingram"); Civil Case No. 04-CV-583 (GMS), against Lexmark International, Inc. ("Lexmark"); and Civil Case No. 04-CV-582 (GMS), against Dell Computer Corporation. ("Dell"). These three cases, as well as the instant case, are set for pre-trial conference before the Court on September 19, 2005 and for trial on the merits on October 17, 2005.

33. On May 10, 2005, Lexmark, Dell, Ingram, and Tech Data filed a Joint Motion for the Court to Consolidate for Trial ("Motion to Consolidate"), moving the Court to consolidate the four cases for trial. On May 20, 2005, Inacom filed a response to the Motion to Consolidate, indicating that it did not oppose a joint evidentiary hearing on the issue of solvency. In addition to seeking consolidation of the actions, Dell, Lexmark and Ingram have filed Motions Requesting a Jury Trial. Tech Data filed a separate joinder to the Motions Requesting a Jury Trial. The Motion to Consolidate and the Defendants' requests for jury trial are pending.

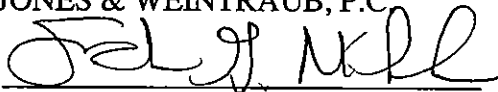
**XV CONTROLLING EFFECT OF PRETRIAL ORDER**

This Order will control the course of the trial and may not be amended except by consent of the Parties and the Court, or by order of the Court to prevent manifest injustice.

Date: \_\_\_\_\_

\_\_\_\_\_  
Honorable Gregory M. Sleet  
United States District Judge

PACHULSKI, STANG, ZIEHL, YOUNG,  
JONES & WEINTRAUB, P.C.



Laura Davis Jones (Bar No. 2436)  
Sandra McLamb (Bar No. 4283)  
Pachulski, Stang, Ziehl, Young,  
Jones & Weintraub, P.C.  
919 North Market St., 16<sup>th</sup> Floor  
Wilmington, Delaware 19899  
Tel.: (302)652-4100  
And

Andrew W. Caine, Esq.  
Jeffrey P. Nolan, Esq.  
Pachulski, Stang, Ziehl, Young,  
Jones & Weintraub, P.C.  
10100 Santa Monica Blvd., 11<sup>th</sup> Floor  
Los Angeles, California 90067  
Tel.: (310) 277-6910

Counsel for Plaintiff  
InaCom Corp.

ADORNO & YOSS, LLP

Charles M. Tatelbaum (Fla. Bar No. 177540)  
(Admitted *Pro Hac Vice*)  
Stephen C. Hunt (Fla. Bar No. 191582)  
(Admitted *Pro Hac Vice*)  
350 E. Las Olas Boulevard, Suite 1700  
Fort Lauderdale, FL 33301  
Telephone: (954) 763-1200  
Facsimile: (954) 766-7800

And

HERLIHY, HARKER & KAVANAUGH

/s/ James F. Harker

James F. Harker (Bar No. 255)  
1300 North Market Street, Suite 400  
Wilmington, Delaware 19899  
Telephone: (302) 654-3111

Counsel for Defendant,  
Tech Data Corporation